

Court of Appeals,

JULY SESSIONS, 1819.



JOHN JONES, Junior,
and others,

Appellants,

and

JOHN WILLIAM WOOLSEY,
and others,

Respondents.



CASE OF THE APPELLANTS.



A. STUART, *for Appellants.*



In Appeal.

IN A CAUSE

Between

JOHN JONES, JUNIOR & al.

(Defendants in Chief and Incidental
Plaintiffs in the Court below,)

APPELLANTS,

and

JOHN WILLIAM WOOLSEY & al.

(Plaintiffs in Chief and Incidental
Defendants in the Court below,)

RESPONDENTS.

THE APPELLANTS' CASE.

THIS is case of a considerable consequence, as the rule to be laid down in it, must extend to and govern all other cases of sales of Flour, as fine flour.

The Declaration is in general *Indebitatus assumpsit*, and contains six counts.

The first count is for goods, wares and merchandizes, to wit: one hundred and eighty-one barrels of *fine flour*, one hundred and twelve barrels of *farine entiere*, two barrels of middling flour, and three hundred barrels of rejected flour, bargained and sold by the Respondents to the Appellants.

The second count is a *quantum valebant*, for the said one hundred and eighty-one barrels of fine flour, &c. as bargained and sold by the Respondents to the Appellants. At the conclusion of these two counts, the Respondents proceed to state that they had delivered a part of the said goods, to wit: the said 112 barrels of *farine entiere* and "have always been and still are ready and willing to deliver to the said Defendants (*Appellants*) the remainder of the said goods, wares and merchandizes above-mentioned, and so bargained and sold as aforesaid, to wit: the said 181 barrels of *fine flour*, &c."

The third count is for goods sold and delivered and a *quantum valebant*.

The fourth count is for work and labour and materials found and provided and for money lent and advanced, money paid and laid out, money had and received, and upon an account stated.

The

The fifth count is for ware-house room and store-house room.

The sixth count is a *quantum meruit* for ware-house room and store-house room.

The sum demanded by this declaration is £1335, currency.

Before the expiration of the rule to plead, the Appellants tendered to the Respondents a sum of £252, currency, which sum not being accepted by the Respondents, was brought into court and deposited there.

To the above declaration the Appellants pleaded,

FIRST—A plea of general issue.

SECONDLY—An incidental demand. In their incidental demand the Appellants state that on the 24th Nov. 1817, they bought from the Respondents one hundred and eighty-one barrels of *fine flour*, 112 barrels of flour of the kind and description commonly called middlings, and 300 barrels of rejected flour, which several quantities of flour the said Respondents engaged to deliver to the said Appellants when they the said Respondents should be thereunto afterwards requested. That the said Appellants afterwards, to wit: &c. at &c. requested the said Respondents to deliver to the said Appellants the said 181 barrels of fine flour, &c. Yet the said Respondents not regarding their said promise and undertaking, did not at the time when they were so requested, or at any other time or times before or afterwards, deliver or cause to be delivered the said 181 barrels of fine flour, &c. to the said Appellants, but wholly neglected and refused so to do, to the damage of the said Appellants of two hundred pounds.

To this incidental demand the Respondents pleaded that they had never refused to deliver the said 181 barrels of fine flour, &c. but that the said Appellants refused to receive the same.

Upon the plea to the demand in chief, and upon the above plea to the incidental demand, issue was joined, and the two demands consolidated with the consent of the parties.

The cause was inscribed on the roll of *enquêtes*, as well on the principal as on the incidental demand.

From the Evidence adduced, the following appear to have been the facts.

On the 24th November, 1817, Mr. Jones, one of the Appellants, agreed to purchase from Mr. Lemoine, one of the Respondents, 181 Barrels of *fine flour*, at £2 10 the barrel; 112 Barrels of *farine entière*, at £2 5 the barrel; two barrels of middling, at £2 5 the barrel; and 300 barrels of rejected Flour, at £2 the barrel. Mr. Lemoine, at the time of this agreement, stated to Mr. Jones, that he had these quantities in the Stores of the firm. It is said by one witness, that Mr. Lemoine mentioned that the flour had been inspected in July, by Mr. Phillips. From the answers of Mr. Jones on *faits et articles*, it would appear, that the witness had mis-conceived what was said on the occasion; but however this may be, the fact is altogether immaterial, the engagement of the Respondents being to deliver merchantable flour. Mr. Jones examined the lot of flour, which was shewn to him as rejected flour, but did not think it necessary to examine that which had been sold to him as fine flour; for a reason which will be hereafter adverted to. On the 10th of the following month, the Respondents delivered to

to the Appellants, the above-mentioned quantity of 112 barrels of *farine entière*, amounting in price to £252. It is for these that a tender in Court was made of that sum, to the Respondents; respecting them therefore no difference exists between these parties. Afterwards, to wit, on the 15th of December, 1817, the Appellants sent to the Respondents' counting-house the following order.

“ Quebec, 15th December, 1817.

“ Messrs. Woolsey, Stewart & Co.

“ Gentlemen,

“ Please to deliver one hundred and eighty-one barrels of fine flour, “ being the quantity purchased of that description, on the 24th November “ last, and oblige

Your obedient servants,

J. JONES, Jr. & Co.”

In consequence of this order, 181 barrels of flour, which the Respondents called *fine flour*, were immediately rolled out of the Respondents' Stores, upon the Queen's Wharf. The Appellants perceiving, that a considerable portion thereof did not answer the description of fine flour, caused the same to be examined by three master Bakers, who reported, that one-sixth of the quantity examined by them, was damaged and unsound. The Appellants accordingly transmitted the report of the Bakers to the Respondents, and refused to receive the flour, unless the Respondents would submit it to a second inspection. The Respondents, well aware that the result of an inspection would be unfavorable to their claims, refused to accede to the demand of the Appellants.

To enable the Court below, duly to appreciate the grounds upon which this refusal proceeded, the Appellants deemed it proper to lay before the Court evidence of the mercantile usage, in Sales like the one in question.

Two merchants, Mr. Patterson and Mr. Munro, were examined. From their testimony, and that of Mr. Finlay, it appears that there is a difference in price of from one to two dollars per barrel, between *fine flour* and *fine sour flour*, and that in commercial language, fine flour, means fine flour which has been inspected, and is merchantable; and that flour which the millers call *fine flour*, is by merchants denominated *rejected flour*, when it ceases to be sound and merchantable. The Appellants apprehend that due weight was not given in the Court below to this evidence. Coupling it with the other evidence, the Appellants conceived that they had completely made out their defence.

The Respondents had engaged to deliver to the Appellants a quantity of fine merchantable flour, and another quantity of fine unmerchantable flour. The latter the Appellants examined, because they were bound to take it such as it was: the former they did not look at, because the engagement of the Respondents could only be fulfilled by the delivery of fine merchantable flour. No delivery was demanded, or offered, until the 15th of December. Injury could not be suffered by either of the parties by the delay from the 24th of November to the 15th of December. The damaged state of the flour arose, no doubt, from hot weather; and in this climate, little apprehensions were to be felt from excessive heat, in those months.

The contract remained then, unfulfilled on the 15th of December; and when the Appellants claimed the fine merchantable flour, which the Respondents

pondents had engaged to deliver, they were offered fine *unmerchantable* flour. An inspection was demanded by the Appellants, and refused by the Respondents.

On the 16th of December, the Respondents, by their Protest of that date, summoned the Appellants "immediately to carry away and take off, " or cause to be carried away and taken off from the Stores and wharves of " Messrs. Woolsey, Stewart & Co. the quantity of One hundred and eighty- " one barrels of *fine flour*, two barrels of middling flour, and three hundred " barrels of rejected flour." Thereby declaring to the said Messrs. John Jones, junior, & Co. that they, the said Messrs. Woolsey, Stewart & Co. do not in any manner consider themselves responsible for the said quantity of 483 barrels of flour, *of the qualities* above-described, &c. To this summons the Appellants answered, "Our reason for not " receiving the fine, we have this day furnished to Messrs. Woolsey, " Stewart & Co. The Certificate of three persons, who say part of the " flour is unsound. The rejected and fine being all bought at the same time, " and forming one bargain, we decline receiving the rejected without the " fine, as the rejected we required only in the event of getting the fine, " being required to work up together."

The fact stated in this answer, of the necessity of having the fine flour for the purpose of working up the rejected flour, is confirmed by the testimony of Mr. Campbell, and other witnesses in the Cause. It serves to account for the refusal of the Appellants, on a subsequent occasion, to take any partial delivery.

On the 30th of the same month of December, when the Appellants had reason to believe that the Respondents had abandoned the chimerical project of compelling them to receive damaged for sound flour, a new verbal notice was given by the Respondents to the Appellants, to come and take away the flour in question. A Protest (No. 23 of record) was immediately served by the Appellants, upon the Respondents. The Respondents persisted in placing the flour on their wharf; and on the 1st of January, 1818, the Appellants wrote to the Respondents the following letter:

" Quebec, 1st Jan. 1818.

" Messrs. Woolsey, Stewart & Co.

" Gentlemen,

" You have informed us, that the flour which is now turned out on " your wharf, is the same which you before offered us, and which a survey " then held thereon, declared to be defective. We have now to request " you to take such courses as you deem proper (giving us immediate notice " thereof) to the end that a survey conformable to law, be held on the said " flour, and in the event of its being of the quality sold us, that we may " remove it to our own Stores immediately."

We are, &c.

This letter produced no effect, and the Appellants perceiving that the Respondents were determined not to expose their flour to a survey, wrote on the 3rd of the same month, the following letter:

Quebec,

" Quebec, 3rd January, 1818.

" Messrs. Woolsey, Stewart & Co.

" Gentlemen,

" As we before informed you, rejected flour was of no use to us without the complement of fine; and as you have thought proper not to deliver the flour in question, agreeable to contract, we shall avail ourselves of our protest, having provided ourselves with flour elsewhere."

We are, &c.

The merits of the incidental demand being the same as those of the demand in chief, it will be unnecessary to enter into details respecting it.

The parties were heard on both demands (*absentibus* the Chief Justice, and Mr. Justice Kerr) and the Court below, on the day of 181 pronounced judgment in the Cause, condemning the Appellants to pay to the Respondents the sum of £1325 *pour valeur en fleur & farine, tel que porté dans la déclaration filée en cette Cause.*

It is not the least remarkable feature in the cause that the value of the flour, &c. stated in the declaration filed in the cause was not £1325 but £1309, of which last sum £252 had been paid into court and received by the Respondents, so that by this judgment the Respondents would be entitled to receive from the Appellants two hundred and sixty-eight pounds more than they themselves state the value of the flour to have been.

By the same judgment the incidental demand was dismissed.

From the judgment, as well upon the demand in chief as upon the incidental demand, this appeal is brought.

Quebec, 20th July, 1819.